

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 ASHWIN KHOBRAKAGE, an
12 individual,

13 Plaintiff,

14 v.

15 COVIDIEN LP, a Delaware
16 limited partnership,

17 Defendant.

Case No.: 16cv468

ORDER

18 HAYES, Judge:

19 The matters before the Court are the Motion for Order Requiring Reconstruction of
20 Electric Data (ECF No. 143) and the Motion for Reconsideration Via Motion to Alter or
21 Amend Judgment (ECF No. 145) filed by Plaintiff Ashwin Khobragade.

22 **I. PROCEDURAL BACKGROUND**

23 On February 19, 2016, Plaintiff initiated this action by filing the Complaint. (ECF
24 No. 1). The Complaint includes claims against Defendant Covidien LP for breach of
25 contract; violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18
26 U.S.C. §§ 1962(c)–(d) based on extortion under § 1961(1), fraud in foreign labor
27 contracting under 18 U.S.C. § 1351(a), and fraud and misuse of immigration documents
28 under 18 U.S.C. § 1546; promissory estoppel; violation of the California Whistleblower

1 Protection Act (CWPA), Cal. Lab. Code § 1102.5; intentional infliction of emotional
2 distress (IIED); negligent infliction of emotional distress (NIED); and fraud. Plaintiff
3 proceeds pro se.

4 On May 18, 2018, Defendant filed a motion for summary judgment which was
5 originally set for hearing on June 18, 2018. (ECF No. 45). The initial deadline for Plaintiff
6 to file a response in opposition was June 4, 2018. On June 4, 2018, the Court issued an
7 Order allowing Plaintiff's attorney to withdraw as counsel and allowing Plaintiff to proceed
8 pro se. The Court further granted Plaintiff a twenty-eight-day extension of time to oppose
9 Defendant's motion for summary judgment. (ECF No. 53).

10 On June 29, 2018, the Court granted (ECF No. 56) Plaintiff's second Motion to
11 Enlarge Time (ECF No. 55) to oppose summary judgment, until July 31, 2018.

12 On July 31, 2018, the Court granted (ECF No. 72) Plaintiff's third request (ECF No.
13 64) to continue time to oppose summary judgment, until September 17, 2018.

14 On August 24, 2018, Defendant filed a Motion to Continue pretrial and summary
15 judgment briefing dates, which Plaintiff opposed on the grounds that "it would be
16 counterproductive for [Plaintiff] to prohibit any longer than the time available." (ECF Nos.
17 75–76).

18 On August 28, 2018, the Court granted the Motion to Continue, stating the
19 opposition to summary judgment was due October 8, 2018. (ECF No. 77).

20 On September 21, 2018, Plaintiff filed a Motion to Reopen Discovery. (ECF No.
21 21). Discovery closed on April 30, 2018 following the Court's January 31, 2018 Order.
22 (ECF No. 24).

23 On October 4, 2018, the Magistrate Judge denied the Motion to Reopen Discovery,
24 stating that "Plaintiff has not demonstrated due diligence . . . in conducting discovery
25 before the summary judgment motion was made and in pursuing his motion to reopen
26 discovery thereafter"; that "prejudice exists to the Defendant who [h]as complied with the
27 deadlines"; and that there was "no good cause for plaintiff's motion to reopen discovery."
28 (ECF No. 93).

1 On October 9, 2018, Plaintiff filed a Motion to Reconsider reopening discovery.
2 (ECF No. 94). On October 11, 2018, Defendant filed a Reply (ECF No. 95) in support of
3 the Motion for Summary Judgment. On October 12, 2018, the Magistrate Judge denied
4 the Motion to Reconsider, stating that Plaintiff “cannot rely on his pro se status as an excuse
5 for his failure to propound his own discovery in this case [Plaintiff] fails to demonstrate
6 any error[,] mistake[,] . . . new law or facts justifying reconsideration.” (ECF No. 98).

7 On October 17, 2018, Plaintiff filed a second Motion to reconsider reopening
8 discovery. (ECF No. 100). On October 18, 2018, the Magistrate Judge denied the second
9 Motion to reconsider, stating, “Plaintiff presents no new evidence that would warrant
10 reconsideration.” (ECF No. 103).

11 On October 30, 2018, Plaintiff filed a Motion to Amend the Complaint. (ECF No.
12 108). On November 5, 2018, Plaintiff filed a fourth Motion to Extend Time to oppose
13 summary judgment. (ECF No. 113). On November 20, 2018, the Court granted the fourth
14 Motion to Extend Time to oppose summary judgment, until December 20, 2018. (ECF
15 No. 118).

16 On November 9, 2018, Defendant filed a Response (ECF No. 116) in opposition to
17 Plaintiff’s Motion to Amend the Complaint. On November 26, 2018, Plaintiff filed a Reply
18 (ECF No. 119) in support of his Motion to Amend the Complaint.

19 On December 14, 2018, Plaintiff filed a fifth Motion to Extend Time to oppose
20 summary judgment. (ECF No. 120). On December 18, 2018, the Court granted the fifth
21 Motion to Extend Time to oppose summary judgment, until January 17, 2019. (ECF No.
22 121). The Court stated that further extensions would not be considered “absent a
23 substantive showing of good cause and excusable neglect.” *Id.* at 4.

24 On December 26, 2018, Plaintiff filed an Ex Parte Motion for Sanctions, stating, “I
25 suffered one temporary injury to my top of the eye and lower lip without any stitches in
26 NJ. . . . My left shoulder had been injured in New York City, New York, while unconscious.
27 . . . Someone while on the train came and hit the left temple of my head my shoulder very
28 badly causing huge pain and discomfort 8/8/2018 while on train. . . . [O]n 12/13/2018 a

1 between 3:30am and 6:30am on train #725 on gold line towards union station, such as
2 getting hurt in right shoulder in the month of November 2018.” (ECF No. 122 at 8, 11–
3 13).

4 On January 8, 2019, Defendant filed a Response (ECF No. 123) in opposition to
5 Plaintiff’s Motion for Sanctions.

6 On January 11, 2019, Plaintiff filed a sixth Motion to Extend Time to oppose
7 summary judgment. (ECF No. 126).

8 On January 14, 2019, Defendant filed a Motion to Declare Plaintiff a Vexatious
9 Litigant. (ECF No. 124).

10 On January 15, 2019, the Court denied the sixth Motion to Extend Time to oppose
11 summary judgment, stating that “Plaintiff shall file any response in opposition to the
12 Motion for Summary Judgment (ECF No. 45) on or before January 30, 2019.” (ECF No.
13 127).

14 On January 18, 2019, Plaintiff filed a Response (ECF No. 128) in opposition to
15 Defendant’s Motion to Declare Plaintiff a Vexatious Litigant, and a Reply (ECF No. 129)
16 in support of Plaintiff’s Motion for Sanctions.

17 On January 24, 2019, Plaintiff filed a seventh Motion to Extend Time to oppose
18 summary judgment. (ECF No. 131).

19 On January 25, 2019, Defendant filed a Reply (ECF No. 133) in support of the
20 Motion to Declare Plaintiff a Vexatious Litigant.

21 On January 28, 2018, the Court denied the seventh Motion to Extend Time to oppose
22 summary judgment, “find[ing] that Plaintiff has failed to demonstrate “excusable neglect,”
23 and stating, “The discovery matters Plaintiff raises have been addressed. There is no
24 evidence that Plaintiff has been denied any discovery to which he was entitled. Plaintiff
25 has had over seven additional months to prepare his opposition. The Court finds that
26 further delay would result in prejudice to the Defendant and to the efficient administration
27 of justice. . . . Plaintiff shall file any response in opposition to the Motion for Summary
28

1 Judgment (ECF No. 45) on or before January 30, 2019.” (ECF No. 135). No response in
2 opposition to the Motion for Summary Judgment was filed.

3 On February 15, 2019, the Court granted Defendant’s Motion for Summary
4 Judgment, denied Plaintiff’s seventh Motion to Extend Time to oppose summary judgment,
5 denied Plaintiff’s Motion for Leave to Amend Complaint, denied Defendant’s Motion for
6 Sanctions, and denied Defendant’s Motion to Declare Plaintiff a Vexatious Litigant. (ECF
7 No. 140).

8 On February 19, 2019, the Clerk entered judgment in favor of Defendant and against
9 Plaintiff. (ECF No. 141).

10 On March 1, 2019, Plaintiff filed a Motion for Order Requiring Reconstruction of
11 Electric Data (ECF No. 143) and a Motion for Reconsideration to Alter or Amend
12 Judgment (ECF No. 145).

13 On March 13, 2019, Defendant filed responses in opposition to the Motion for Order
14 Requiring Reconstruction of Electric Data (ECF No. 149) and the Motion for
15 Reconsideration Via Motion to Alter or Amend Judgment (ECF No. 150).

16 On March 11, 2019 and March 15, 2019, Plaintiff filed supplemental documents in
17 support of his Motions. (ECF Nos. 148, 152, 154).

18 **II. MOTION FOR ORDER REQUIRING RECONSTRUCTION OF** 19 **ELECTRIC DATA**

20 Plaintiff seeks an order “requiring Defendant Covidien L[P] to reconstruct the
21 [P]laintiff[’]s electronic data . . . and . . . sanction[ing] the defendant for \$857,000,000.”
22 (ECF No. 143 at 6). Plaintiff contends that he is entitled to such an order according to
23 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) because he had electronic
24 data “with him until the order on motion for summary judgment” and it was “frozen or
25 blocked and or corrupted or hacked rendering it without any data in the documents.” *Id.* at
26 2, 5.

27 Defendant asserts, “Plaintiff’s Motion is entirely unintelligible and clearly lacks any
28 basis in law or fact.” (ECF No. 149 at 2).

1 The excerpts of *Zubulake* cited by Plaintiff relate to discovery and sanctions for
2 spoliation of evidence. The Court finds that Plaintiff does not set forth a legal basis upon
3 which this Court can award the relief he seeks.

4 For the reasons the Court set forth in its February 15, 2019 Order, the record does
5 not support an award of sanctions against Defendant. *See* ECF No. 40 at 32–35.

6 **III. MOTION FOR RECONSIDERATION VIA MOTION TO ALTER OR**
7 **AMEND JUDGMENT**

8 Plaintiff contends that the grounds of newly discovered evidence, clear error, and
9 manifest injustice support relief under Rule 59(e) because conduct by Defendant interfered
10 with his ability to file a response in opposition to summary judgment. Plaintiff contends
11 that there is mistake, inadvertence, surprise, or excusable neglect within the meaning of
12 Rule 60(b)(1) because the Court did not provide notice of the deadline to file a response in
13 opposition to summary judgment. Plaintiff contends that newly discovered evidence
14 supports relief under Rule 60(b)(2) because Defendant hid evidence from him and he did
15 not get a chance to present evidence regarding summary judgment. Plaintiff contends that
16 fraud within the meaning of Rule 60(b)(3) entitles him to relief because conduct by
17 Defendant interfered with his ability to respond in opposition to summary judgment.
18 Plaintiff contends that relief is justified under Rule 60(b)(6) because Plaintiff conduct by
19 Defendant interfered with his ability to respond in opposition to summary judgment.
20 Plaintiff contends he is entitled to relief under Rule 50, Rule 56, “And Or . . . According to
21 the other rules of Federal Rule of Civil Procedure and or by mandatory case law and or by
22 persuading case law.” (ECF No. 145 at 45).

23 Defendant contends that Plaintiff is not entitled to relief under Rule 59(e) or 60(b)
24 because he demonstrates no new facts, circumstances, or law, as required by the rules.

25 Rule 59(e) states, “A motion to alter or amend a judgment must be filed no later than
26 28 days after the entry of the judgment.” Fed. R. Civ. P. 59(e). A district court may alter
27 or amend judgment under Rule 59(e) if “(1) the district court is presented with newly
28 discovered evidence, (2) the district court committed clear error or made an initial decision

1 that was manifestly unjust, or (3) there is an intervening change in controlling law.”
2 *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001). Altering or amending
3 a judgment under Rule 59(e) is an “extraordinary remedy to be used sparingly.” *Carroll*
4 *v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). “A motion for reconsideration under Rule
5 59(e) should not be granted, absent highly unusual circumstances, unless the district court
6 is presented with newly discovered evidence, committed clear error, or if there is an
7 intervening change in the controlling law.” *McDowell v. Calderon*, 197 F.3d 1253, 1255
8 (9th Cir. 1999) (quotation omitted).

9 Rule 60(b) states,

10 On motion and just terms, the court may relieve a party or its legal
11 representative from a final judgment, order, or proceeding for . . . (1) mistake,
12 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence
13 that, with reasonable diligence, could not have been discovered in time to
14 move for a new trial under Rule 59(b); (3) fraud (whether previously called
15 intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
16 (4) the judgment is void; (5) the judgment has been satisfied, released or
vacated; it is based on an earlier judgment that has been reversed or
vacated; or applying it prospectively is no longer equitable; or (6) any other
reason that justifies relief.

17 Fed. R. Civ. Proc. 60(b). “The party seeking relief under Rule 60(b)(6) must show
18 ‘extraordinary circumstances’ justifying the reopening of a final judgment.” *Wood v. Ryan*,
19 759 F.3d 1117, 1120 (9th Cir. 2014) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535
20 (2005)). “A motion under Rule 60(b) must be made within a reasonable time—and for
21 reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the
22 date of the proceeding.” Fed. R. Civ. P. 60(c). The burden of proof is on the party bringing
23 the Rule 60(b) motion. *See Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383 (1992).

24 In this case, the Court concludes that the record does not support a finding that any
25 of the grounds for granting a Rule 59(e) motion are present. There are not “highly unusual
26 circumstances” present to justify the “extraordinary remedy” of relief under Rule 59(e).
27 *See McDowell*, 197 F.3d at 1255. The Court further concludes that the record does not
28

1 support a finding that any of the grounds for granting a Rule 60(b) motion are present. The
2 record reflects several occasions on which Plaintiff was notified of the deadline to respond
3 in opposition to summary judgment. The record reflects several opportunities for Plaintiff
4 to respond in opposition to summary judgment. The record does not support a finding of
5 fraud within the meaning of Rule 60(b)(3). Plaintiff has not shown “‘extraordinary
6 circumstances’ justifying the reopening of a final judgment.” *See Wood*, 759 F.3d at 1120.

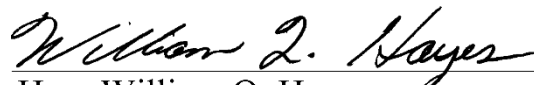
7 A notice of appeal must be filed “within 30 days after entry of the judgment or order
8 appealed from.” Fed. R. App. P. 4(a)(1)(A). “Federal Rule of Appellate Procedure
9 4(a)(4)(A) tolls the deadline to file a notice of appeal upon the timely filing of certain
10 motions, including a motion to alter or amend the judgment under Federal Rule of Civil
11 Procedure 59, such that the time to appeal—here, 30 days—runs ‘from the entry of the
12 order disposing of the last such remaining motion.’” *Demaree v. Pederson*, 887 F.3d 870,
13 875 (9th Cir. 2018); *see also Swimmer v. I.R.S.*, 811 F.2d 1343, 1344 (9th Cir. 1987) (“A
14 motion pursuant to Fed. R. Civ. P. 59 . . . extends the time for appeal. . . . A motion pursuant
15 to Fed. R. Civ. P. 60 does not.”), *abrogated on other grounds by Briones v. Riviera Hotel*
16 *& Casino*, 116 F.3d 379 (9th Cir. 1997) *as stated by Middleton v. Guaranteed Rate, Inc.*,
17 684 F. App’x 674, 675 (9th Cir. 2017) (“The filing of the second motion for reconsideration
18 did not toll the time to appeal the underlying judgment.”).

19 IV. CONCLUSION

20 IT IS HEREBY ORDERED that the Motion for Order Requiring Reconstruction of
21 Electric Data filed by Plaintiff Ashwin Khobragade (ECF No. 143) is DENIED.

22 IT IS FURTHER ORDERED that the Motion for Reconsideration Via Motion to
23 Alter or Amend Judgment filed by Plaintiff Ashwin Khobragade (ECF No. 145) is
24 DENIED.

25 Dated: April 2, 2019

26 
27 Hon. William Q. Hayes
28 United States District Court